of the Estate of Walter E. O'Hara without any legal evidence to support such a decree, then in that event her constitutional right as provided by Article 5 of the Amendment to the Constitution is being violated.

This is not a case involving judicial error or a miscarriage of justice as for example where a decision is made or judgment is entered contrary to the evidence or the weight thereof. In this case we firmly maintain there is no legal evidence; not even a scintilla of such evidence which will support a finding that Mrs. O'Hara made a "gift" of her property to her husband, or that she "relinquished" or abandoned her rights therein to her husband.

We respectfully contend that the judgment entered is also in violation of the law of the land as laid down by this Honorable Court in the case of *Stickney* vs. *Stickney* (*supra*).

Your petitioner respectfully requests that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals, First Circuit, affirming the decree of the United States District Court for the District of Massachusetts be granted.

Respectfully submitted,

WALTER I. SUNDLUN,
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Attorneys for Petitioner

BRIEF IN SUPPORT OF PETITION

The opinion of the Circuit Court of Appeals, First Circuit, was handed down on July 9, 1943. It holds in part as follows:

> ". . . The sole issue is whether the appellant relinquished all rights in two policies given to her by her late husband,

> Walter E. O'Hara, on May 2, 1939 by returning them on September 21, 1940 . . . It is not necessary to summarize the facts. The master's report and opinion of the district court adequately state them. The Master had before him direct and positive testimony to the effect that Mrs. O'Hara returned the policies in question to her husband on September 21, 1940 and he concluded that she completely relinquished all her rights in them on that date. . . ."

The Circuit Court in no other manner makes an analysis of the evidence. It affirms the finding of the Master, even though it is an unquestioned fact that the Master based his opinion upon a series of inferences, each inference being drawn from a preceding one and all of them being without any foundation in fact or supporting legal evidence.

The instant case is based on an action which is equitable in nature and thus both questions of law and questions of fact can be examined by this Honorable Court.

We humbly petition this court that the evidence be examined, and to apply the established law of the land. *If there is any legal evidence to establish a "gift" from Mrs. O'Hara to her husband, there should be no difficulty in pointing out the page or the question and answer in the record where such evidence appears!* Your petitioner will be content if that is done —but we firmly say that there is no such evidence in the record; and thus the judgment now entered stands without any legal foundation therefor. Her property is being taken from her without any legal basis therefor.

The Circuit Court has not given any effect to the law of the land as laid down by this Honorable Court.

In the case of

U. S. vs. *Ross*, 92 U. S., 281, 284:

the Supreme Court of the United States held:—

> "There are inferences from inferences; presumptions resting on the basis of another presumption. Such a mode of arriving at a conclusion of fact is generally, if not universally, inadmissible. No inference of fact or of law is reliably drawn from premises which are uncertain. Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved and not themselves presumed. . . . The law requires an open, visible connection between the principal and evidentiary facts and the deductions from them, and does not permit a decision to be made on remote inferences."

In the case of

> *Manning* vs. *Mutual Life Insurance Company,* 100 U. S. 693, 697

the court held

> ". . . But the presumed fact must have an immediate connection with or relation to the established fact from which it is inferred. If it has not, it is regarded as too remote. The only presumptions of fact which the law recognizes are immediate inferences from facts proved. . . ."

In the case of

> *Cunard S. S. Co. Ltd.* vs. *Kelley, et al,* Cir. App. 1st Cir., 126 F. 610,

the court held

> ". . . The judgment of a jury must be based upon the evidence in the case. While they may draw legitimate inferences, they may not wander into the field of imagination of remote possibilities. It cannot adopt an inference from a few of the proven facts when that inference is absolutely inconsistent with and is repelled by other equally well-proven facts."

In the recent case of

DaRosa vs. *First Natl. Stores, Inc.*, 62 R. I. 213

the R. I. Supreme Court rejected a verdict based upon two inferences and held

> ". . . A jury is not permitted to indulge in such a series of inferences with only remote direct evidence upon which to support it."

This principle of law is supported by

Texas & Pacific Railroad vs. *Gentry*, 163 U. S. 196.

The Master admits that many of his findings are based upon inferences from circumstances and probabilities. (M. R. 66, 68.)

In the case of

Kim vs. *Snyder*, C. C. A. 7th Cir. 145, 327 at 329,

the Circuit Court held:

> ". . . Mere conjecture will not sustain verdicts. They must be founded on evidence which convinces the mind. They cannot rest on mere guess or speculation." (*Spencer* vs. *Railway Co.*, Wis. 311, 313.)
>
> *Midland Valley R. Co.* vs. *Fulgham*, 191 F. 91 (104 C. C. A. 151).
>
> *Bolen Coal Co.* vs. *Hicks*, 190 F. 717, 111 C. C. A. 445.
>
> "A theory cannot be established in a civil action of circumstantial evidence, unless the facts relied on are such that it is the only conclusion that can be reasonably drawn from them." (*U. S. Fidelity & Guaranty Co.* vs. *Des Moines Natl. Bank*, 145 F. 273, 74 C. C. A. 553 (8th)

Likewise the U. S. Circuit Court, First Circuit, by its opinion disregards the law of the land as decreed by this Honorable Court in the case of *Stickney* vs. *Stickney*, 131 U. S. 327, *supra*.

The opinion of the *Stickney* case is followed by all other courts of last resort. The Supreme Court of Pennsylvania said in

Grable vs. *Moyer,* 45 Pa. 533

". . . It lies upon one who asserts it to be the property of the husband to prove a transmission of the title either by gift or contract for value, for the law does not transmit it without the act of the parties. . . . Nothing is more easy than for a husband to obtain possession, even against the consent of a wife, and where he obtains it with her consent, it can be at most but slight evidence of a gift."

Eminent authorities hold "such gifts" (wife to husband) "are never to be inferred".

Daniels Chancery, Sec. 100, page 101
Story Eq. Jur., Sec. 1395, 1396
Johnson Chancery Reports, 86-114

The Supreme Court of Pennsylvania in considering a similar question said in the case of

Bergey's Appeal, 60 Pa. 408

"She (the wife) was not bound to attempt to rescue it from him, or proclaim that it was not a gift. . . . The presumption is that he (the husband) received it for his wife . . . for her sole and separate use. . . . He should be compelled to account in equity." (The unquoted words inserted by us.)

M. A. Carpenter vs. *D. L. Carpenter,* 105 A. L. R. 386

"The presumption is against gift. It must be established beyond suspicion." Rice on Evidence, p. 990, Vol. II.

Grey vs. *Grey,* 47 N. Y. 552:
Jannings vs. *Davis,* 31 Conn. 138

The Court held in the case of

Adoe vs. *Spencer*, 56 L. R. A. 817 at 830

> "There seems no reason in common sense, that, when a husband takes of the principal of his wife's estate into his possession, he should be presumed to acquire it as his own unless she has exacted some evidence in writing or an express agreement by him otherwise. There are many reasons why the rule should be the reverse of this and that such a taking should be deemed a loan to him unless he prove otherwise. In equity surely, no other rule should obtain."

In the case of

Colangelo vs. *Colangelo*, 46 R. I. 139,

the Supreme Court of Rhode Island held:

> "Where the money delivered by a wife to her husband constituted the corpus of her whole estate, on action by wife to recover, charge that under the circumstances of the case, the burden was on defendant husband to show that the transaction was a gift and not a loan was correct. . . . "

The respondent offered *no evidence* in the instant case to sustain this burden!

Bagley vs. *Bagley*, 57 R. I. 186
Cornell vs. *Kettelle*, 62 R. I. 128, 137.

The courts have universally held as follows:

> "The evidence to prove a gift must be clear and convincing and every essential element of a gift must be proved."

Carpenter vs. *Carpenter*, 105 A. L. R. 386. (R. C. L. Gifts—45).

In the case of

Allen-West Com. Co. vs. *Grumbles et ux*, 129 F. 287 (63 C. C. A. 401 8th Cir).

Sanborn, Circuit Judge for the court held

> "In every case of an alleged gift, the burden of proof is upon the donee to establish a complete and valid donation. . . . Among the indispensable conditions of a valid gift are the intention of the donor to absolutely and irrevocably divest himself of the title dominion and control of the subject of the gift in praesenti at the very time he undertakes to make the gift. *Botchford* vs. *Com. Internal Revenue*, 81 F. (2d) 914, C. C. A. 9th; *Peoples Savings Bank* vs. *Ryan*, 57 R. I. 411."

The record of the instant case will not produce any evidence which the above stated law demands.

It is judicially decreed in this case that Mr. O'Hara dealt deceitfully and treacherously with his wife in many instances and it therefore follows his special administrator does not come into court "with clean hands" in the instant case.

If the findings of the Master which are based upon a series of inferences and none of which have any foundation in fact are to form the basis for taking away from Mrs. O'Hara—(a wife) her property and thus practically leave her almost penniless, and if upon such findings a wife is to be held to have made a "gift" of her property to her husband—then all the law as laid down by this Honorable Court in the case of *Stickney* v. *Stickney* and by other courts of last resort in determining the legal requisites to sustain a gift from a wife to a husband is of no avail. A wife under such circumstances is clearly left without the protection intended for her by this Honorable Supreme Court and other courts of last resort in like cases.

In the case of

Hurtado vs. *California*, 110 U. S., 535

this Court held:

> "And the words 'due process of law' in the Amendment . . . do mean in its regular course of administration according to prescribed forms, and in accordance with the general rules for the protection of individual rights."

Clearly "general rules for the protection of individual rights" must mean that only legal evidence such as this court and other courts of last resort require to prove and establish a gift from a wife to a husband must be present in the record of the case to sustain the finding that Mrs. O'Hara made a gift to her husband.

Clearly it is not contemplated by the *Hurtado* case that such a finding can be made if there is no such evidence supporting the same; nor does it contemplate that the speculative deductions, all of which are of a master, based upon a series of inferences and none of which have any foundation in fact, can form the basis for maintaining a gift from a wife to a husband.

It is held in the *Hurtado* case also—that the "requirement of the Constitution is met if the trial is had according to the settled course of judicial proceedings."

The settled course of judicial procedings demands the introduction of legal evidence to support a finding that a wife made a "gift" to her husband.

In the instant case the judicial proceedings to date do not include the presentation or introduction of any such evidence. There is just no such evidence in the record!

In the case of

Burton et al vs. *Platten* (C. C. A. 7th Circuit)

Sanborn, Circuit Judge, held

> "It is a principle that lies at the foundation of all just government that no man shall be deprived of his life, lib-

> erty, or property without due process of law. Every disregard of this principle by courts, legislatures, or citizens tends directly toward distrust, insecurity, disorder, and anarchy. It may be difficult, perhaps impracticable, to give a definition of 'due process of law' which would comprehend all cases as they arise, and it is certainly unnecessary to do so. Chancellor Kent says: 'The better and larger definition of "due process of law" is that it means law in its regular administration through courts of justice.' 2 Kent, Comm. 13. Certain it is that, in judicial proceedings, due process of law must be a course of legal proceedings, according to those rules and forms which have been established for the protection of private rights. It must be one that is appropriate to the case, and just to the parties affected. It must be pursued in the ordinary manner prescribed by the law. . . ."

The instant case has not been pursued in accordance with the prescribed law. The deision made in the instant case is not in pursuance of judicial proceedings for in not requiring legal evidence to sustain the judgment the court has not followed legal proceedings according to those rules and forms which have been established for the protection of private rights.

The law of the land has thrown around a wife certain safeguards so that when a wife delivers her property to her husband it cannot be held that a delivery in and of itself raises a presumption of a gift. The legal presumption is that it is not a gift and that the husband holds his wife's property as trustee for her or that it is a loan.

It must appear that a gift is clearly intended. The courts have held that even more than a persuasive argument to obtain a gift will invalidate it and yet in spite of such safeguards thrown around a wife by the courts of our country, including this Honorable Supreme Court, in the instant case—Mrs. O'Hara, wife of a man who has been judicially decreed "a slippery calculating" individual "full of guile

and treachery" by the Master in his report, is now confronted with the great danger of being bereft of her property in violation of the law of the land as enunciated by this Honorable Supreme Court and in violation of her constitutional right that she should not be deprived of her property without due process of law.

We respectfully submit that the Circuit Court of Appeals, First Circuit "has so far departed from the accepted and usual course of judicial proceedings, and has so far sanctioned such a departure by the lower court, as to call for an exercise of this Honorable Court's power of supervision in the instant case".

We respectfully submit that by taking her property away from her without any legal evidence furnishing a basis therefor, and by forcing a decision upon her that she made a "gift" of her property to her husband without any legal evidence supporting such a finding, Mrs. O'Hara is having her property taken away from her without due process of law.

CONCLUSION

We respectfully petition this Honorable Court to grant Mrs. O'Hara's petition for a writ of certiorari.

This case presents a situation where, without relief to which she is justly entitled, the wife of a man who wrongfully deceived her will be forced to suffer innocently.

For the aforegoing reasons, it is respectfully submitted that the judgment of the Circuit Court of Appeals of the First Circuit is clearly erroneous and should be reversed.

Respectfully submitted,
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